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In the

Supreme Court of the United States

OCTOBER TERM 1960

No. ~~716~~ 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,
Petitioner,

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully submits this Brief in opposition to the Petition for a Writ of Certiorari filed by Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America in this cause.

QUESTIONS PRESENTED

Were certiorari granted, the questions presented on the merits would be one or possibly both of the following:

1. Where conduct of a labor union, found by a state court to be tortious, is obviously neither protected by nor condemned by Federal law, may the state court entertain an action for damages arising out of such conduct?

2. Does Federal labor legislation deprive state courts

of jurisdiction of cases involving breach of collective bargaining agreements?

More specifically, does section 301 of the Taft-Hartley Act (granting Federal courts jurisdiction of suits for breach of collective bargaining agreements) deprive the states of such authority or limit the law they may apply in such cases?

However, before these questions arise at all, we respectfully point out that the questions *now* before this Court are more limited, and might be framed as follows:

1. Should this Court grant a writ of certiorari to review the decision of a department of the Supreme Court of Washington (from which decision petitioner did not seek relief *en banc*)?

2. And, in any event, where the state court has granted damages for breach of a labor agreement, should certiorari be granted to review that decision, no Federal or constitutional question having been necessarily decided?

STATEMENT OF THE CASE

Petitioner has set forth its partisan version of the events leading to this dispute. Since the case was tried essentially on the basis of *stipulated* facts, it seems more appropriate to review these. (References to St. are to the Statement of Facts, i.e., transcript of the testimony in the trial court, now on file herein.)

The strike here in question occurred May 28, 1958, and was thereafter enjoined; on petitioner's demand

and pursuant to the collective bargaining agreement the dispute was submitted to arbitration; there were extensive hearings (Exhibit 15, St. 172) resulting in an Award of Arbitrators dated November 7, 1958 (Exhibit 12, St. 112). That Award included factual findings which are binding on both parties to this litigation; the petitioner union so stipulated in open court (St. 18), and this was also the written stipulation between the parties on September 11, 1958 (Exhibit 11, St. 112). The trial judge said, "The case was presented to this court on the basis that the facts found by the arbitrators and set forth in the award of arbitrators are binding and conclusive upon this court" (St. 190). These facts may be summarized as follows:

Melvin T. Welsch was employed by respondent company in 1953, first as a truck driver and then as a warehouseman (Exhibit 12, pages 1 and 2). He was incompetent in both capacities. On one or more occasions respondent was so dissatisfied with Welsch's services that Welsch was fired, but was reinstated because petitioner union threatened to strike (Exhibit 12, page 3), this in spite of the fact that under its contract with the union respondent had a right to discharge an employee whose services were unsatisfactory (Exhibit 1, Article 11). The respondent employer kept Welsch on, fearing reprisals by the union (Exhibit 12, pages 3 and 4). In May, 1958, Welsch started a new fork lift truck while it was in gear, and ran it off respondent's loading platform onto the railroad tracks, with resulting damage to the truck and some injury to himself. Welsch was fired when he tried to return to work on May 27, 1958

(Exhibit 12, pages 5 and 6). The discharge was fully justified; Welsch's work was unsatisfactory, there was a reasonable basis for the employer's dissatisfaction, and respondent acted in good faith in discharging him (Exhibit 12, pages 7 and 8). The strike followed immediately (and, incidentally, involved much more than the "one-man picket" petitioner refers to in its brief; see St. 35-41, 103, 104, 143 *et seq.*),

The sole issue in the lawsuit at the time of trial was respondent's claim of damages (St. 190, 191), based on both tort and breach of contract (not on violation of Federal law, no such violation being alleged or proved).

ARGUMENT IN OPPOSITION TO CERTIORARI

1. Jurisdiction.

Respondent Lucas Flour Company objects to the Petition for a Writ of Certiorari on the ground that petitioner has failed to exhaust its appellate judicial remedies in the State of Washington and herein seeks to review a decision of other than the highest court of that State.

The opinion sought to be reviewed is found as Appendix A to the Petition for a Writ of Certiorari. This was the opinion of a department only, (Department Number One), as appears on its face, and was signed by five of nine Judges of the Supreme Court of Washington. The record does not reveal any, and in fact there was no, petition for rehearing or petition for hearing *en banc* by Local 174. Such petitions, and the departmental procedure generally, are authorized by the Washington State Constitution, the applicable stat-

utes, and by the Rules on Appeal of the Supreme Court of the State of Washington. See Article IV, Section 2, Washington State Constitution; Revised Code of Washington 2.04.160 (Laws of 1909, Chapter 24, Section 4); Rule 50, Rules on Appeal 34A Wn.(2d) 55.

In the case of *Gorman v. Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. ed. 1300 (1942), we find this statement:

> "Upon examination of the record it appears that the decision and judgment brought here for review were rendered by Division One of the Supreme Court of Missouri, which consists of four of the seven judges of the court. It does not appear that the judgment thus rendered has been reviewed by the Supreme Court sitting en banc or that petitioners have made application, as they could have done under § 4 of the 1890 amendments to Article 6 of the state constitution, to transfer the cause to the full court for review."

This situation is duplicated in the cause at hand. This Court went on to say in the *Gorman* case:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted . . . Hence it is the last state tribunal —here the court en banc—to which the cause could be brought for review which is 'the highest court of a state in which a decision could be had' within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes."

The petition was therefore dismissed; a rehearing was subsequently denied. 316 U.S. 711, 62 S. Ct. 1272, 86 L. ed. 1777. We cannot find that this decision has been limited or overruled. We believe it governs the matter at bar and that the Petition should be dismissed, as a matter of law and also because in principle this Court's jurisdiction should not be invoked until every available remedy below has been sought and denied.

2. The Conclusions Reached by the Supreme Court of the State of Washington Are Not Contrary to the Decision of This Court in *San Diego Building Trades Council v. Garmon*

This is the fundamental argument of petitioner, which may be shortly stated as follows: That in the *Garmon* case, 359 U.S. 236, 3 L.ed.(2d) 775, 79 S.Ct. 773 (1959) this Court held that a state court may not award damages to an employer in a suit brought because of union conduct alleged to be in violation of the Taft-Hartley Act. This Court said, in part (359 U.S. at page 244):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield."

To the same effect is *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955), and cases cited. Petitioner asserts that its conduct in the case at hand was protected by section 7 or condemned by section 8 of the Taft-Hartley Act (it isn't clear which)

and that the state court should have declined jurisdiction, the National Labor Relations Board having exclusive jurisdiction.

The flaw in petitioner's argument is that petitioner does not, and cannot, show how its conduct falls, even remotely, under sections 7 or 8 of the Taft-Hartley Act.

The stipulated facts are that the strike here in question was an effort to coerce an employer into rescinding the discharge of an incompetent employee whom the employer had discharged in good faith and with good cause. Such conduct is coercive and tortious in the State of Washington, within the meaning of such cases as *Swenson v. Seattle Central Labor Council*, 27 Wn.(2d) 193, 177 P.(2d) 873 (1947) and *Safeway Stores v. Retail Clerks Union*, 184 Wash. 322, 51 P.(2d) 372 (1935). Moreover, by the view of most courts, including the Federal courts, such conduct constitutes a breach of a subsisting contract, at least if the contract contains (as here) a compulsory arbitration clause. *N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc.* (D.C. La. 1920) 265 Fed. 397; *N.L.R.B. v. Sunset Minerals*, (C.A. 9, 1954) 211 F.(2d) 224; *United Construction Workers v. Haislip Baking Co.* (C.A. 4, 1955) 223 F.(2d) 872, cert. den. 350 U.S. 347; *Lewis v. Benedict Coal Corp.* (C.A. 6, 1958) 259 F.(2d) 346. For a contrary view, see *U.M.W.A. v. N.L.R.B.* (C.A. of D.C., 1958) 257 F.(2d) 211, and cf. dissent therein. The National Labor Relations Board agrees with the majority; see *W. L. Mead, Inc.* 113 N.L.R.B. 1040, 36 L.R.R.M. 1392 (1955); and see Cox, Some Aspects of the Labor Management Act of 1947, 61 Harv. L. Rev. 274, 308

(1948). For collected cases see 2 A.L.R.(2d) 1278, 1281, and the A.L.R.(2d) Series Supplement, Vol. 1 at page 112. The Supreme Court of Washington therefore could, and did, rest its decision in the present case, upholding a modest award of damages, on *either* tort *or* breach of contract, and not on any violation of Federal law. Nor *could* it rely on Federal law.

Petitioner's conduct was neither protected by section 7 nor condemned as an unfair labor practice by section 8 of the Taft-Hartley Act.

As to section 7, which protects conduct of a union for mutual aid and protection, the conduct in question is not covered because a) it was in breach of contract, and therefore not protected by the Act, *W. L. Mead, Inc.* 113 N.L.R.B. 1040, *supra;* and b) it wasn't for mutual aid and protection at all but rather for a private whim of the union business agent who called the strike. See Finding of Fact VII (T. 26):

> "The Court, notwithstanding said award (of arbitrators), and over objections of plaintiff's (respondent's) counsel, allowed the introduction of evidence bearing on the good faith of defendant (petitioner) in picketing plaintiff's place of business. The Court expressly finds, from all of said evidence, the picketing was the result of the decision of aforesaid Floyd Anderson (petitioner's business agent); that the defendant has not disputed nor did it dispute at the trial its responsibility for the acts and conduct of said Floyd Anderson; *that said Floyd Anderson was motivated by something other than the union's mutual aid and protection;* and that the defendant union has failed

to produce evidence of sufficient weight to satisfy the burden of proof in support of its affirmative defense that the union acted justifiably under the circumstances." (Emphasis and parentheses added.)

See also part 4 of this Argument.

As to whether petitioner's conduct was condemned by section 8 of the Taft-Hartley Act, a careful examination of that section will fail to reveal any portion which even indirectly condemns petitioner's conduct in this case as an unfair labor practice. Certainly a breach of a labor agreement is not, *per se,* an unfair labor practice. *McCarroll v. Los Angeles County (etc.)* (Calif. 1957) 315 P.(2d) 322, cert. den. 355 U.S. 932, 2 L.ed. 415. As pointed out in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957), the N.L.R.B. is not the proper forum for disputes arising out of breaches of labor contracts, unless the breaches are also unfair labor practices as defined by Federal law.

This is not to say that by imaginative logic it might not be possible to find something about petitioner's conduct which was remotely covered under sections 7 or 8 of the Taft-Hartley Act. However, a mere argumentative coincidence in the facts with a plausible N.L.R.B. action does not destroy state jurisdiction. *I.A.M. v. Gonzales,* 356 U.S. 617, 2 L.ed.(2d) 1018, 78 S.Ct. 923 (1958). In the *Garmon* case, on which petitioner primarily relies, the adjudication in the state court was not remotely but directly based "on the assumption that the behavior of the petitioning unions

constituted an unfair labor practice" under Federal law. 359 U.S. 236 at page 245.

3. The Decision Is Not Contrary to *Textile Workers Union v. Lincoln Mills.*

The Supreme Court of the State of Washington said that section 301 of the Taft-Hartley Act, while conring jurisdiction upon lower Federal courts to entertain suits for breach of labor contracts, did not preempt state jurisdiction or limit the substantive law to be applied. Petitioner takes exception to the last part of this statement and argues that the case of *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957), *supra,* held that "Federal interpretation of federal law will govern, not state law." The quoted portion simply refers to what law a *Federal* district court will apply in interpreting *Federal* law in a section 301 case. It does not say, nor does the Taft-Hartley Act direct, what law the state courts will apply in matters properly before them. The argument, however, is academic. If there is any Federal common law on what constitutes a breach of a labor contract, then the rule applied in the case at hand is fully in accord therewith (see comments under part 2 of this Argument).

4. Policy Considerations.

Petitioner contends that public policy protects a union in using economic sanctions in good faith efforts to defend its members' jobs. However, this was factually not the situation here. The trial court said (St. 201):

> "Considering all of the factors, including the demeanor of the various witnesses on the witness stand, their apparent candor and lack of candor, and the reasonableness of the stories that are related, the evidence preponderates in favor of the plaintiff's position that Mr. Anderson (the union business agent who ordered the strike) was not motivated by, nor did he even believe that he was attempting to enforce compliance with the seniority provision of the contract or any other provision of the contract." (Parenthetical portion added).

The union, in short, asserts that it has some fundamental right to disregard its contract and require the employer to do its will, contract or no!

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be dismissed for want of jurisdiction, or should be denied.

Respectfully submitted,

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